FEDERAL IMMIGRATION LAW AND THE CASE FOR OPEN ENTRY

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I. INTRODUCTION

The most basic features of United States immigration law generate continuing controversy. Public debate over federal statutory limits on entry into the United States is ongoing and frequently passionate. The practical importance of the subject seems undeniable. The lives or welfare of many people are directly implicated. Many legal and political philosophers, as well as immigration specialists, however, shy away from some of the most fundamental issues of moral limits on immigration.

A possible explanation for this inattention may be that many students of basic immigration policy half-consciously perceive that broad legal restrictions on entry into the United States cannot be morally justified. These persons also assume that opening legal entry into the United States would require current United States residents to endure a painful sacrifice of important interests and privileges. Admittedly, academic calls for collective self-sacrifice are not unknown. In the immigration context, however, the direct beneficiaries of an open entry policy do not currently vote or maintain an organized presence in the United States. Calls for an open entry policy are therefore understandably not particularly common.

This Article seeks to broaden the debate not only by arguing for an open entry policy, but also, perhaps surprisingly, by arguing that a carefully crafted version of an open entry policy need not involve costs to current citizens so substantial as to practically disqualify such a policy.

It is widely assumed that an open entry policy would simply result in "swamping the lifeboat"; that is, in the abrogation of national sovereignty,[1] in enormous costs in unemployment,[2] in reduced wage rates and other economic and welfare costs,[3] in jeopardizing our national cultural

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1. *See infra* part II.B.
2. *See infra* part II.D.
3. *See infra* part II.D.

identity,[4] and in slowing or reversing progressive political and social change.[5] Each of these obvious concerns requires a different response, and each is addressed separately below.

The defense of an open entry policy is thus multifaceted. But it may be of general interest to think about the possibility of "decoupling" an open entry policy from various more or less related areas of government policy, including minimum wage rates, benefits eligibility, and voting rights.[6] Once this decoupling process is undertaken, it becomes clear that various costs of open entry can be minimized or redistributed in ways that enhance the appeal of an open entry policy.[7]

This Article concludes by examining the moral arbitrariness of restrictions on immigration and by constructing a broad-based affirmative moral case for open entry.[8] It is hoped that over time, the public debate over limitations on immigration can be broadened, deepened, and otherwise enhanced.

II. THE FEARED CONSEQUENCES OF OPEN ENTRY

A. Preliminary Observations

Recent debate over United States immigration law has raised important issues of public policy.[9] There should, however, be no illusions as to the remarkably narrow scope of the debate. Current United States immigration policy may seem generous, relative to that of many other nations.[10] But this should not obscure the fact that the mainstream, contemporary immigration debate focuses only upon various substantially restrictive immigration policies. What might reasonably be referred to—with sensible qualifications—as an open entry policy of any sort is not typically considered a viable option.[11]

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4. *See infra* part II.C.

5. *See infra* part II.C.

6. *See infra* part II.D.

7. *See infra* part II.D.

8. *See infra* part III.

9. Michael Ross, *Simpson Seeks 5-Year Cut in Legal Immigration*, L.A. TIMES, Mar. 3, 1994, at A15.

10. *See, e.g.*, Fiallo v. Bell, 430 U.S. 787, 795 n.6 (1977); James Woodward, *Commentary: Liberalism and Migration*, *in* FREE MOVEMENT 59, 63 (Brian Barry & Robert E. Goodin eds., 1992).

11. *See, e.g.*, Louis L. Jaffe, *The Philosophy of Our Immigration Law*, 21 LAW & CONTEMP. PROBS. 358, 367 (1956) ("No one, in fact, denies that the policy of unlimited immigration is obsolete . . . ."); Judith Lichtenberg, *Within the Pale: Aliens, Illegal Aliens, and Equal Protection*, 44 U. PITT. L. REV. 351, 376 (1983) (discussing "the recognition that unlimited immigration to the United States would in fact constitute a grave threat to its existence (to its existence, anyway, in anything like its present form)"); Michael S. Teitelbaum, *Right Versus Right: Immigration and Refugee Policy in the United States*, 59 FOREIGN AFF. 21, 55 (1980)

Given the limitations on judicial decision making, it is not surprising that the courts do not take an open immigration policy seriously.[12] The apparent indifference of most major legal and moral philosophers[13] is, however, less justifiable.[14] To the extent that such writers ignore immigration questions, or merely assume the implausibility of any open entry policy, this indifference should be called into question. This Article therefore seeks to expand interest in the most basic assumptions underlying the law of immigration, and in the viability of some forms of an open entry policy.

Substantial legal restriction of immigration is not a clear reflection of historical tradition in the United States. Currently, of course, entry into the United States is subject to legal restriction.[15] Alien immigration was, however, essentially unrestricted at least at the federal level until 1875,[16] with the first general immigration statute following only in

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("[I]t is clear that advocacy of unlimited immigration into the United States cannot be taken seriously in a world in which three billion people are very poor and their numbers increasing rapidly."); *Developments in the Law: Immigration Policy and the Rights of Aliens*, 96 HARV. L. REV. 1286, 1338 (1983) [hereinafter *Developments in the Law*] ("[V]irtually all experts concede the necessity of setting some limits on immigration . . . .").

12. *See, e.g.*, United States v. Aguilar, 883 F.2d 662, 695 (9th Cir. 1989) ("The proposition that the government has a compelling interest in regulating its border hardly needs testimonial documentation."), *cert. denied*, 498 U.S. 1046 (1991); *see also* Jean v. Nelson, 472 U.S. 846, 880 (1985) (Marshall, J., dissenting) (referring apparently without question to "the valid immigration goal of reducing the number of undocumented aliens arriving at our borders").

13. Professor Donald Galloway points out that while Bruce Ackerman has argued for broad entry rights, writers such as John Rawls, Robert Nozick, and Ronald Dworkin have largely bypassed extended discussion of the justice of particular immigration policies. *See* Donald Galloway, *Liberalism, Globalism, and Immigration*, 18 QUEEN'S L.J. 266, 269 n.4 (1993); *see also* THOMAS NAGEL, EQUALITY AND PARTIALITY 179 (1991) ("[T]he preservation of a high standard of life depends absolutely on strict controls on immigration."). The name of Professor Joseph Carens should be added to that of Ackerman as taking seriously something like an open entry policy. *See, e.g.*, Joseph H. Carens, *Migration and Morality: A Liberal Egalitarian Perspective*, *in* FREE MOVEMENT, *supra* note 10, at 25 ("Thus the presumption is for free migration and anyone who would defend restrictions faces a heavy burden of proof."); *see also* Roger Nett, *The Civil Right We Are Not Ready For: The Right of Free Movement of People on the Face of the Earth*, 81 ETHICS 212, 218 (1971) ("[I]t may well be discovered that the right to free and open movement of people on the surface of the earth is fundamental . . . in the same sense as is free religion, speech, and the franchise.").

14. Perhaps as a result of the current near consensus against any sort of open entry policy, the term "open society" in the immigration context has been appropriated to refer not to an open entry policy, but to a system restricting immigration to roughly current levels, without bias and with the prospect of rapid transition to citizenship. *See* Lawrence H. Fuchs, *Directions for U.S. Immigration Policy: Immigration Policy and the Rule of Law*, 44 U. PITT. L. REV. 433, 438 (1983).

15. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 205 (1982) (discussing basic statutory restriction).

16. Kleindienst v. Mandel, 408 U.S. 753, 761 (1972). Professor Gerald Neuman has argued that significant restraints on immigration existed, especially state-imposed restrictions,

1882.[17] Legal restrictions on the total annual amount of immigration into the United States were not imposed until 1921.[18]

Plainly, matters such as United States population density, international wage differentials, government benefit programs, and the demand for unskilled labor do not now stand as they did during our first century. Each of these considerations bears legitimately upon United States immigration law and policy. It would therefore be absurd to argue that since an open entry policy was once viable, it must remain viable today.

Still, the historical fact of roughly a century of open entry into the United States has some force against certain kinds of cultural, as opposed to economic, arguments against an open entry policy. Both cultural[19] and economic[20] concerns are examined below. For the moment, it suffices to observe that in light of our first century of open entry, any argument that the United States ethos or the United States community requires rigorous cultural restrictiveness in immigration is implausible.[21] Whether the United States ethos in fact requires, or at least suggests, abolishing such restrictiveness is taken up below.[22]

For some time now, admittedly, federal immigration law has imposed substantial restrictions on immigration.[23] Since 1990 specified annual ceilings or maxima are imposed on most important categories of immigrants.[24] Although statutory provision is made for the granting of

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prior to this date. *See* Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833 (1993).

17. An Act to Regulate Immigration, ch. 376, 22 Stat. 214 (1882); *see Kleindienst*, 408 U.S. at 761.

18. Jaffe, *supra* note 11, at 358. Generally, passports were not legally required until 1952. *See* Kent v. Dulles, 357 U.S. 116, 121 (1958), *overruled on other grounds by* Califano v. Aznavorian, 439 U.S. 170 (1978). For a concise discussion of the major subsequent statutory developments affecting immigration, see Joan A. Pisarchik, Note, *A Rawlsian Analysis of the Immigration Act of 1990*, 6 GEO. IMMIGR. L.J. 721, 732-44 (1992).

19. *See infra* part II.C.

20. *See infra* part II.D.

21. *See* Peter H. Schuck, *The Transformation of Immigration Law*, 84 COLUM. L. REV. 1, 86 (1984) (describing early U.S. conception of community as "one embracing all who wished to come and remain here").

22. *See infra* part II.C.

23. *See, e.g.*, Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1498, 1510 (11th Cir.) (citing 8 U.S.C. § 1182(f) (1988), authorizing President to suspend alien entry into United States when President determines it would be detrimental to national interest), *cert. denied*, 112 S. Ct. 1245 (1992). For a brief discussion of some of the traditional statutory grounds for exclusion, see, for example, GUY S. GOODWIN-GILL, INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES 124-28 (1978).

24. *See, e.g.*, 8 U.S.C. § 1151(c)-(e) (Supp. IV 1993) (imposing annual limits respectively on family-sponsored, employment-based, and diversity immigrants). For a brief overview, see, for example, AUSTIN T. FRAGOMEN, JR. & STEVEN C. BELL, IMMIGRATION FUNDAMENTALS: A GUIDE TO LAW AND PRACTICE 2-1 to -3 (1992).

asylum to a class of refugees, granting such asylum remains within the discretion of the Attorney General.[25] More broadly, persons deemed illegally present, border arrivals temporarily paroled into the United States, and would-be entrants interdicted on the high seas are subject to deportation or exclusion on the basis of correspondingly minimal hearing rights.[26]

In general, the substantive legal rights of even the most desperate individuals seeking initial entry into the United States have been thought to be modest. The Supreme Court has thus observed, in apparently anachronistic[27] language, that "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative."[28] Indeed, this judicial position is frequently encountered.[29] It has even been suggested that "Congress can bar aliens from entering the United States for discriminatory and arbitrary reasons, even those that might be condemned as a denial of equal protection or due process if used for purposes other than immigration policy."[30]

Taken literally, this doctrine would validate, for example, an entry scheme based on the willingness of potential entrants to undergo severe and prolonged physical torture. It is, therefore, not surprising that some

25. *See* INS v. Elias-Zacarias, 112 S. Ct. 812, 815 (1992); INS v. Cardoza-Fonseca, 480 U.S. 421, 423 (1987).

26. *See, e.g.*, Sale v. Haitian Ctrs. Council, Inc., 113 S. Ct. 2549 (1993); *see also* Landon v. Plasencia, 459 U.S. 21, 25-27 (1982) (differentiating between deportation and exclusion hearings); *Haitian Refugee Ctr.*, 953 F.2d at 1506 (concluding that "no right to judicial review exists for aliens who have not presented themselves at the borders of this country").

27. *See* William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

28. *Landon*, 459 U.S. at 32.

29. *See, e.g.*, Fiallo v. Bell, 430 U.S. 787, 804 (1977) (Marshall, J., dissenting) (referring to U.S. government argument that "aliens have no constitutional right to immigrate to the United States"); Kleindienst v. Mandel, 408 U.S. 753, 762 (1972) ("It is clear that Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise."); Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) ("[A]n alien who seeks admission to this country may not do so under any claim of right."); Marczak v. Greene, 971 F.2d 510, 513 (10th Cir. 1992) (stating that Congress's authority over immigration is "exceptionally broad"); *Haitian Refugee Ctr.*, 953 F.2d at 1507 (discussing "Congress's intent to preclude judicial review of administrative determinations concerning aliens"); Adams v. Baker, 909 F.2d 643, 647 n.3 (1st Cir. 1990) ("It is, of course, beyond peradventure that Gerry Adams, an unadmitted and non-resident alien, has no right, constitutional or otherwise, to enter the United States."); Li Hing of Hong Kong, Inc. v. Levin, 800 F.2d 970, 970-71 (9th Cir. 1986) (stating that Congress's power over aliens is "virtually complete" and decisions concerning admissions of aliens are not subject to review). For a general discussion, see Richard F. Hahn, Comment, *Constitutional Limits on the Power to Exclude Aliens*, 82 COLUM. L. REV. 957 (1982).

30. *In re* Longstaff, 716 F.2d 1439, 1442 (5th Cir. 1983), *cert. denied*, 467 U.S. 1219 (1984).

writers have expressed sympathy for the idea of constitutional restrictions on immigration criteria and procedures.[31] Regardless, this Article will show the sheer feasibility and moral attractiveness of some forms of open entry policy, without launching prematurely into a debate as to the constitutional status of such a policy.

B. Open Entry and National Sovereignty

What sort of open entry policy, then, could be thought feasible and morally attractive? Assuming the continued existence of nation-states, legitimate military defense must be distinguished from unjust foreign invasion. As one writer has observed, "It would be something of a joke to refer to . . . defensive military action as 'immigration restriction.' "[32] It is

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31. *See, e.g.*, STEPHEN H. LEGOMSKY, IMMIGRATION AND THE JUDICIARY 177-222 (1987); T. Alexander Aleinikoff, *Citizens, Aliens, Membership and the Constitution*, 7 CONST. COMMENTARY 9, 17 (1990); Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and its Progeny*, 100 HARV. L. REV. 853, 886 (1987) [hereinafter Henkin, *A Century of* Chinese Exclusion] ("The power of the United States to control immigration, whatever the source of that power, is subject to the Constitution . . . ."); Louis Henkin, *The Constitution as Compact and as Conscience: Individual Rights Abroad and at Our Gates*, 27 WM. & MARY L. REV. 11 (1985); Michael Scaperlanda, *Polishing the Tarnished Golden Door*, 1993 WIS. L. REV. 965, 979; *see also* Hiroshi Motomura, *The Curious Evolution of Immigration Law: Procedural Surrogates for Substantive Constitutional Rights*, 92 COLUM. L. REV. 1625 (1992) (contrasting immigration law with increasing constitutional protections for aliens in other areas of law); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545, 547 (1990) (discussing critics' concerns over lack of constitutional judicial review of immigration law).

Of course, even in the absence of constitutional restrictions on immigration policy, Congress may by statute mandate adherence to certain basic principles of justice. *See, e.g.*, Allende v. Shultz, 845 F.2d 1111, 1121 & n.18 (1st Cir. 1988) (discussing statutory prohibition of excluding aliens based upon beliefs, speech, or associations).

Finally, current principles of international law offer little of broad and direct use in opening borders. *See, e.g.*, American Baptist Churches in the U.S.A. v. Meese, 712 F. Supp. 756, 771 (N.D. Cal. 1989) ("[E]ven assuming that temporary refuge does qualify as a principle of customary international law, it will not be applied in a domestic court if Congress is found to have specifically rejected the asserted norm."); Ann Dummett, *The Transnational Migration of People Seen from Within a Natural Law Tradition*, *in* FREE MOVEMENT, *supra* note 10, at 169, 171; David C. Hendrickson, *Migration in Law and Ethics: A Realist Perspective*, *in* FREE MOVEMENT, *supra* note 10, at 213, 218 ("In the traditional understanding of international law, a state need not invoke its vital interests to justify the exclusion of strangers."); *cf.* Daniel C. Turack, *Freedom of Transnational Movement: The Helsinki Accord and Beyond*, 11 VAND. J. TRANSNAT'L L. 585, 586 & n.4 (1978) (noting that Helsinki Accord is not legally binding). For the leading English case, which starkly limited the ability of would-be immigrants to litigate denial of entry, see Chun Teeong Toy v. Musgrove, 1891 App. Cas. 272 (P.C.) (appeal taken from Supreme Court of Victoria).

32. James L. Hudson, *The Ethics of Immigration Restriction*, 10 SOC. THEORY & PRAC. 201, 227 (1984); *see also* Kleindienst v. Mandel, 408 U.S. 753, 765 (1972) (discussing power to exclude aliens for sake of "defending the country against foreign encroachments and dangers"); Narenji v. Civiletti, 617 F.2d 745, 748 (D.C. Cir.) (stating that "policy toward aliens is

possible, of course, to refer to any substantial influx of entrants as an "invasion," but such concerns seem to raise the sorts of cultural or communitarian concerns that are addressed below,[33] rather than military security in a narrow sense.[34]

Admittedly, there may be intermediate cases in which, for example, a country seeks to export its prison or mental hospitalization costs by forcing, persuading, or merely allowing massive numbers of these undesired residents to emigrate to a particular recipient state. The best guide in such cases will be our sense of whether, as in the classic immigrant case, the decision to enter was made exclusively by each would-be entrant, even if under the press of circumstance, or whether the entry is ultimately traceable to a donor-government policy of seeking to externalize perceived costs by encouraging emigration. Whether a foreign government is seeking on a major scale to manipulate a generous United States entry policy should not, in practice, be unusually difficult to determine. A genuine open entry policy, then, need not invite foreign exploitation.

This argument can be expanded, though, by considering whether an open entry policy is in all contexts consistent with the idea of national sovereignty. Courts have frequently held that the power to limit immigration, or to deny entry, is a necessary, inherent aspect of national sovereignty.[35] With this doctrine I take no issue. It is important, however,

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vitally and intricately interwoven with contemporaneous policies in regard to the conduct of . . . the war power . . . ." (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952) (footnote omitted))), *cert. denied*, 446 U.S. 957 (1980); *Developments in the Law*, *supra* note 11, at 1315 ("Governmental power to regulate admission . . . [is] necessary . . . to protect the country from foreign encroachments and dangers.").

33. *See infra* part II.C.

34. The problem of a foreign government's conscious decision to send large numbers of its own citizens is raised hypothetically in Jean v. Nelson, 727 F.2d 957, 975 (11th Cir. 1984), *aff'd*, 472 U.S. 846 (1985). For a less hypothetical Cuban example, see John A. Scanlan & O.T. Kent, *The Force of Moral Arguments for a Just Immigration Policy in a Hobbesian Universe*, *in* OPEN BORDERS? CLOSED SOCIETIES? 61, 70 (Mark Gibney ed., 1988). For a recognition that military security is not incompatible with a degree of openness, see Pericles's Funeral Oration:

> If we turn to our military policy, there also we differ from our antagonists. We throw open our city to the world, and never by alien acts exclude foreigners from any opportunity of learning or observing, although the eyes of an enemy may occasionally profit by our liberality; we trust less in system and policy than in the native spirit of our citizens . . . .

THUCYDIDES, THE PELOPONNESIAN WAR 109 (T.E. Wick trans., 1982).

35. *See, e.g.*, Fiallo v. Bell, 430 U.S. 787, 792 (1977); *Jean*, 727 F.2d at 964 ("For centuries, it has been an accepted maxim of international law that the power to control the admission of foreigners is an inherent attribute of national sovereignty." (citing Fong Yue Ting v. United States, 149 U.S. 698, 707-11 (1893))); Sanchez v. Kindt, 752 F. Supp. 1419, 1422 (S.D. Ind. 1990); *see also* Henkin, *A Century of* Chinese Exclusion, *supra* note 31, at 853-54 (tracing

to recognize how little this doctrine, by itself, actually says. It should be clear that the mere possession of a power, in this case of limiting entry, does not require the actual exercise of that power in practice.

Thus, we might equally grant that the fully sovereign government of a territory necessarily must possess the authority to inflict legal punishments, including the death penalty. It would hardly follow, however, that a state is no longer sovereign if, perhaps by statute or by constitutional amendment, it consistently declines to impose, or constitutionally disables itself from imposing, the death penalty.

Similarly, a government could remain sovereign if it freely and conscientiously chose a policy of open entry, even if such a border policy was written into its constitution. Such a policy could represent an authoritative, deliberate act of self-definition and self-determination by the public in its sovereign capacity. Such a choice seems at the very least as compatible with genuine national sovereignty as the current United States policy of nominally asserting complete legal border control while in practice exerting only minimal control over the entry and departure of undocumented persons.[36]

Thus, the idea of sovereignty itself does not require any particular degree of actual openness or closure of borders, any more than sovereignty itself requires, for example, any particular approach to population policy. A community may, in its sovereign capacity, choose to extend its scope to encompass a broadly defined or even partially self-selected class of current outsiders.[37] A broad, or in some respects open-ended, community self-definition need not amount to an abrogation of community sovereignty. It should thus be clear that the relevant fear is not that open entry jeopardizes national sovereignty, but that open entry may threaten community self-preservation as a defined, distinctive culture.[38]

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doctrine in U.S. law to Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581 (1889)); David A. Martin, Book Review, 84 AM. J. INT'L L. 987, 987 (1990) (reviewing OPEN BORDERS? CLOSED SOCIETIES?, *supra* note 34) (referring to "widely held view" that "the admission and exclusion of aliens are the discretionary prerogative of sovereign nations").

36. *See* Tom Morganthau, *America: Still a Melting Pot?*, NEWSWEEK, Aug. 9, 1993, at 16, 20 (citing Lawrence H. Fuchs, Acting Chair of U.S. Commission on Immigration Reform, for estimate of as high as 500,000 undocumented alien entrants annually).

37. *But cf.* Cabell v. Chavez-Salido, 454 U.S. 432, 439-40 (1982) (holding that aliens are outside scope of community political self-definition process). On a related analogy, current members of the community are thought of as property owners, who on that basis may or may not choose to extend or partially transfer those rights, voluntarily, to current outsiders. This analogy is referred to in Stephen H. Legomsky, *Immigration Law and the Principle of Plenary Congressional Power*, 1984 SUP. CT. REV. 255, 269.

38. For references to a linkage between restrictions on entry and "self-preservation" in one sense or another, see, for example, Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892)

C. Open Entry and National Cultural Character

I have suggested above that open entry need not countenance manipulation or invasion by foreign powers,[39] and that open entry is compatible with self-determination and self-definition at the national level.[40] Instead, the real worry seems to be that open entry may lead to a failure to preserve the nation's basic character.[41] Open entry might, it is thought, transform a society culturally beyond recognition in allegedly undesirable ways.

First, it is believed that open entry, or merely excessive, rapid immigration, might lead to adverse changes in the receiving country's political culture.[42] Assume for the purposes of this discussion that the receiving country's political culture is, to some sufficient degree, genuinely or objectively good. Without this assumption, mere political self-preservation would carry little moral weight. Even on this assumption it is difficult to see why current residents have some sort of absolute right against adverse political-cultural changes not stemming from foreign invasion or manipulation. Convincing arguments must be made why protecting against adverse political-cultural changes is genuinely incompatible with all forms of open entry policy, and why the harms of such cultural changes outweigh or outrank all possible rights and interests of all would-be immigrants who are to be barred. It is not immediately obvious why person *A* should be protected from a less attractive political culture at the cost of starvation, poverty, or repression of person *B*.

These matters are pursued in general terms below.[43] For the moment, I merely assert that through what I call decoupling, the United States might combine an open entry policy with a variety of legal measures designed to minimize the risk that immigration will slow or reverse any momentum toward progressive political change within the United States.[44]

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and James A.R. Nafziger, *The General Admission of Aliens Under International Law*, 77 AM. J. INT'L L. 804, 804 (1983); see also MICHAEL WALZER, SPHERES OF JUSTICE 51 (1983) for the argument that "the right to restrain the flow [of immigrants] remains a feature of communal self-determination."

39. *See supra* notes 32-34 and accompanying text.

40. *See supra* note 37 and accompanying text.

41. *See, e.g.*, ALAN DOWTY, CLOSED BORDERS 14 (1987).

42. *See* Jürgen Habermas, *Citizenship and National Identity: Some Reflections on the Future of Europe*, 12 PRAXIS INT'L 1, 17 (1992) (discussing Hannah Arendt's analysis, permitting citizenship only if prospective citizen is willing to "be a member of this particular historical community"); James W. Nickel, *Human Rights and the Rights of Aliens*, *in* THE BORDER THAT JOINS 42 (Peter G. Brown & Henry Shue eds., 1983); Schuck, *supra* note 21, at 89.

43. *See infra* part III.

44. *See infra* notes 111-15 and accompanying text.

A broader challenge to an open entry policy raises the prospect of adverse cultural, and not merely political-cultural, changes flowing from allegedly excessive immigration. The desire to limit immigration may reflect "a concern that cultural change should not proceed so rapidly as to destabilize United States society."[45] This broader culturally based challenge is an important one, and cannot be evaded by questioning whether genuine cultural stability is currently possible for the United States at any level of immigration, by questioning whether we can clearly distinguish between cultural stability and instability, or even by demanding to know why our being spared cultural instability should trump the rights and interests of would-be immigrants.

In some measure, of course, concerns for cultural stability may simply mask "paranoia, xenophobia, and racism,"[46] along with unwarranted national chauvinism. In other cases concern for cultural stability may depend upon a romantic, unrealistic view of the extent to which the contemporary United States constitutes a culturally uniform genuine community.[47] It may be unreasonable to accuse an open entry policy of undermining a national community if the United States would not remotely approach a genuine community at any level of immigration.[48]

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45. Gerald L. Neuman, *Rhetorical Slavery, Rhetorical Citizenship*, 90 MICH. L. REV. 1276, 1288 (1992) (reviewing JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION (1991)). The classic international law theorist Emmerich de Vattel discusses a right to refuse entry to, among others, those the nation "has just cause to fear . . . will corrupt the manners of the citizens, . . . will create religious disturbances, or occasion any other disorder, contrary to the public safety." 1 EMMERICH DE VATTEL, THE LAW OF NATIONS 108 (Joseph Chitty trans., reprint ed. n.d.). A purported concern for public morals and for an alleged unassimilable invasion of Chinese immigrants constituting "a menace to our civilization" is discussed in Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 594-96 (1889).

46. *See* Henkin, *A Century of* Chinese Exclusion, *supra* note 31, at 859.

47. *See* WILL KYMLICKA, LIBERALISM, COMMUNITY, AND CULTURE 221-22 (1991) (criticizing Michael Walzer's overestimate of extent to which actual nation-states constitute essentially homogenous cultural communities); Richard C. Sinopoli, *Liberal Justice, National Community*, 15 HIST. EUR. IDEAS 519, 524 (1992) (attacking Walzer's failure to differentiate between states and communities).

48. *See, e.g.*, Aleinikoff, *supra* note 31, at 30. For further relevant discussion, see David A. Martin, *Due Process and Membership in the National Community: Political Asylum and Beyond*, 44 U. PITT. L. REV. 165, 194-95 (1983), which refers to the scholarly debate over whether communities should be thought of as purposive or as organic entities, and Andrew Mason, *Liberalism and the Value of Community*, 23 CANADIAN J. PHIL. 215 (1993). Mason refers to the possibility of a community united only by shared geographical location, *see id.* at 217, while observing that "there does not seem to be a distinctive set of values shared by many or most British people," *id.* at 221. Mason also refers to the quite sensible view that community, in any rich sense of the term, "is necessarily restricted to small groups." *Id.* at 224. These observations suggest the unreasonableness of the view that the United States now constitutes one unified cultural community, but would likely lose this homogeneity after a period of open entry. For further discussion of the ambiguous notion of community, see SEBASTIAN DE

It is, however, certainly possible to argue that an open entry policy would greatly increase the current level of ethnic conflict within the United States, resulting in greatly enhanced ethnic violence, hostile separatism, and cultural polarization. Examples of nation-states torn by such sectarian division are, unfortunately, not difficult to cite.[49] The problem of cultural conflict sufficient to justify restrictions on entry is addressed in stages below.

Two preliminary points can be made regarding the issue of whether cultural conflict justifies restrictions on entry. First, it is apparently difficult to find an era in United States history in which it could not be soberly judged that social or cultural conflict was threatening our sense of community.[50] Yet, in retrospect, what may have struck us at the time as the loss of valued solidarity may later seem a neutral or even valuable cultural development.[51] Second, and relatedly, given that dubious collective track record in recognizing unredeemed loss of community, and in view of the interests of the would-be entrants at stake, application of something like a demanding "clear and present danger" test may be appropriate if entry is to be restricted based on fear of sufficiently severe cultural conflicts that would presumably not otherwise occur.[52]

GRAZIA, THE POLITICAL COMMUNITY (1963), ROBERT A. NISBET, THE QUEST FOR COMMUNITY (1953), and THE CONCEPT OF COMMUNITY (David W. Minar & Scott Greer eds., 1969).

49. *See, e.g.*, Teitelbaum, *supra* note 11, at 43. *But cf.* Habermas, *supra* note 42, at 7 ("[E]xamples of multicultural societies like Switzerland and the United States demonstrate that a political culture . . . by no means has to be based on all citizens sharing the same language or the same ethnic and cultural origins."). For a contemporary argument for the possible stability of a society featuring many sharp and basic cultural conflicts, see JOHN RAWLS, POLITICAL LIBERALISM (1993).

50. *See* Robert C. Post, *Between Democracy and Community: The Legal Constitution of Social Form*, *in* DEMOCRATIC COMMUNITY 163, 164-65 (John W. Chapman & Ian Shapiro eds., 1993).

51. The classic Hart-Devlin debate shows the difficulty of assessing the actual net social costs of cultural changes once deemed threatening. *Compare* PATRICK DEVLIN, THE ENFORCEMENT OF MORALS at ix (1965) ("[T]he judgment which the community passes on a practice which it dislikes must be calm and dispassionate and that mere disapproval is not enough to justify interference.") *with* H.L.A. HART, LAW, LIBERTY AND MORALITY 82 (1963) ("There is no evidence that the preservation of a society requires the enforcement of its morality 'as such.' ").

52. Even the early immigration case of Fong Yue Ting v. United States, 149 U.S. 698 (1893), sounds something of a cautionary note in referring to "evident danger" and "manifest injury," *id.* at 707 (quoting 1 DE VATTEL, *supra* note 45, § 230). For a discussion of the contemporary "clear and present danger" test in the context of restrictions on freedom of speech, see Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

Cultural change is always threatening to a society,[53] and has of course been a constant feature of life in the United States.[54] The consensus, however, is that the cultural changes wrought by immigration have been generally beneficial[55]—at least in retrospect.[56] It is important to ask directly, though, whether the United States ethos is genuinely compatible with an open entry policy.

It is of course impossible to fairly summarize the United States ethos in general. Certain strands, qualities, and themes, however, can be identified. Certain currents seem dominant over time. It does not take long, for example, for Michael Walzer's analogy of the United States to an elite university, "besieged by applicants,"[57] to begin to break down. It may be that for an elite university to avoid compromising its distinct mission, it must reject an open admissions policy in favor of selectivity. And it is certainly possible to speak of national aspirations or perfectionism, or of overridingly important national cultural goals.[58]

But the United States ethos simply does not require analogous attempts, futile or successful, at selectivity among entrants. One way of explaining this would be to say that the United States ethos is by its nature not concretely perfectionist; another would be that there is no set of cultural priorities or substantive goals, held in common, to which immigration policy might be accommodated.[59] We could just as well say, however, that substantive or perfectionist dimensions of the United States ethos—our highest and best public selves—are compatible with, and may actually require, an open entry policy.

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53. *See, e.g.*, PETER MARRIS, LOSS AND CHANGE 7 (1974).

54. *See, e.g.*, KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 29 (1989).

55. *See id.* at 269.

56. *See, e.g.*, Nathan Glazer, *The Integration of American Immigrants*, 21 LAW & CONTEMP. PROBS. 256, 258 (1956).

57. WALZER, *supra* note 38, at 32.

58. *See, e.g.*, Charles R. Beitz, *Cosmopolitan Ideals and National Sentiment*, 80 J. PHIL. 591, 599-600 (1983).

59. *See, e.g.*, T. Alexander Aleinikoff, *Aliens, Due Process and "Community Ties": A Response to Martin*, 44 U. PITT. L. REV. 237, 240-41 (1983) (debunking existing notion that there is no unifying United States ideology of culture). This argument need not go so far as to say that public policy can long afford to be utterly neutral—even if this is possible—among all competing conceptions of private good or private aims. For the likely instability of any such attenuated political culture, see WILLIAM A. GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE (1991).

There is certainly no point in denying historic[60] and contemporary[61] United States cultural strands opposed to substantial, broad-based immigration. The benefit of hindsight, however, invariably leaves most of us with a collective sense of embarrassment over such impulses.[62] Other deeper, cultural themes that we tend to be prouder of in moments of reflection, have long run in the direction of diversity, pluralism, heterogeneity, and inclusion. Professor Frederick Whelan has observed that "[d]iversity in the sense of ethnic and cultural pluralism has always been an important aspect of the American tradition."[63] Immigration has obviously been a crucial source of that renewing diversity. Professor Whelan has further recognized that "[a]n ongoing tradition of diverse immigration is arguably part of the very identity of the democratic community of the United States."[64]

Plainly, the United States has been an immigrant society,[65] a multiracial and multicultural society,[66] and will surely remain so[67] regardless of future immigration policy. Diversity and pluralism are not merely facts, but basic societal values.[68] Although we can hardly predict the

60. The reader is invited to reflect, for example, upon The Chinese Exclusion Case, 130 U.S. at 581, in itself and as a reflection of popular sentiment. *See also* Legomsky, *supra* note 37, at 286 ("Whether for cultural, economic, political, or environmental reasons, various immigrant waves have typically received at least mixed, and more commonly hostile, public reactions."); Schuck, *supra* note 21, at 81 (referring to "the nativist impulses that have always been an important, albeit often deplorable, element of our national character").

61. *See, e.g.*, Malissia Lennox, Note, *Refugees, Racism, and Reparations: A Critique of the United States' Haitian Immigration Policy*, 45 STAN. L. REV. 687 (1993); Scaperlanda, *supra* note 31, at 967 n.8 (documenting contemporary opposition to significant levels of non-European immigration); Bruce W. Nelan, *Not Quite So Welcome Anymore*, TIME, Fall 1993, at 10, 10-11 (reporting strong and apparently increasing public sentiment in favor of strict limits on (legal) immigration).

62. *See supra* note 42 and accompanying text.

63. Frederick G. Whelan, *Principles of U.S. Immigration Policy*, 44 U. PITT. L. REV. 447, 469 (1983); *see* KARST, *supra* note 54, at 183.

64. Frederick G. Whelan, *Citizenship and Freedom of Movement: An Open Admission Policy?*, *in* OPEN BORDERS? CLOSED SOCIETIES?, *supra* note 34, at 3, 30.

65. *See, e.g.*, JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 3-4 (1991).

66. *See, e.g.*, Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863, 869 (1993). More broadly, see Onora O'Neill, *Ethical Reasoning and Ideological Pluralism*, 98 ETHICS 705, 718 (1988) ("[W]e cannot assume a homogeneous *Sittlichkeit* [moral sense] either within or beyond boundaries.").

67. *See* KARST, *supra* note 54, at 174.

68. *See* PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT 134 (1985) ("[I]nclusiveness is especially important for a society that prides itself on its openness to immigrants."); Andrew Cutrofello, *Must We Say What "We" Means?: The Politics of Postmodernism*, 19 SOC. THEORY & PRAC. 93, 102 (1993) (reviewing three works discussing "possibility of creating communities that recognize and respect diversity"); Glazer, *supra* note 56, at 265 (describing U.S. culture as "based on difference and heterogeneity"); Hendrickson,

precise demographic effects of a shift to open entry, it seems reasonable to suppose that open entry would implicitly enhance cultural diversity in crucial respects. Nor would we necessarily be optimizing diversity by significantly restricting entry, even if the formulae for priorities among entrants were maximally sensitive to any recognized underrepresentation of various groups within United States society. It is not entirely clear that even if group *A* is uncontroversially assumed to be underrepresented relative to group *B*, diversity is really better served by admitting twenty *A*s and no *B*s, as opposed to fifty of each. Threshold levels may matter as much as percentages.

Admittedly, it is possible that just the increase in immigration attributable to an open entry policy may lead to additional cultural conflict. Such additional cultural conflict may be thought to somehow morally outweigh the rights and interests of the additional potential immigrants. Increases in immigration, whether enhancing diversity or not, may well lead to social friction, as in the case of contemporary Germany.[69]

There is, however, some reason not to be unduly fearful of such a prospect. Recall first that the United States political system involves not merely federalism, but the far more radical—and initially counterintuitive—notion that increasing the number and the diversity of Madisonian "factions" actually tends to discourage the worst, most disruptive polit-

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supra note 31, at 223; Allan C. Hutchinson, *Inessentially Speaking (Is There Politics After Postmodernism?)*, 89 MICH. L. REV. 1549, 1571 (1991) (reviewing MARTHA MINOW, MAKING ALL THE DIFFERENCE (1990)) (referring to celebration of "cultural diversity that makes each of us partly who we are"); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1507 (1988); Robert C. Post, *Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment*, 76 CAL. L. REV. 297, 303 (1988) ("If pluralism celebrates the diversity of cultures, individualism acclaims instead the diversity of persons."); Kim Lane Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2074 (1989) (referring to works celebrating diversity as value); Teitelbaum, *supra* note 11, at 23 ("[M]ost of us look with pride upon the invigoration and pluralism that immigrants continue to provide."); *see also* George P. Fletcher, *Update the Pledge*, N.Y. TIMES, Dec. 6, 1992, § 4 (late Sunday edition), at 19 (recommending revised Pledge of Allegiance referring to "one nation, united in our diversity"). For judicial recognition of the value of diversity, see, for example, Metro Broadcasting v. FCC, 497 U.S. 547, 548 (1990). For the value of diversity in rather a different context, see EDWARD O. WILSON, THE DIVERSITY OF LIFE (1992) and J.M. Thoday, *Selection and Genetic Heterogeneity*, *in* GENETIC DIVERSITY AND HUMAN BEHAVIOR 89, 90 (J.N. Spuhler ed., 1967). *But cf.* Herman R. van Gunsteren, *Admission to Citizenship*, 98 ETHICS 731, 736-37 (1988) (arguing that prospective citizens should "grow into" knowledge of historical community, culture, and dominant language).

69. *See, e.g.*, Habermas, *supra* note 42. *But cf.* Timothy King, *Immigration from Developing Countries: Some Philosophical Issues*, 93 ETHICS 525, 535 (1983) ("[C]ultural diversity can make for lively and distinct societies, such as Brazil.").

ical and cultural outcomes.[70] The rough idea is that the greater the number and variety of groups, the more difficult it will be for any single group or coalition to communicate, coordinate, and combine in such a way as to subvert the broader public interest. Enhancing diversity by multiplying factions through an open entry policy could thus lead to long-term social and political stability.

Certainly it would be unrealistic to simply view all immigrants as themselves constituting a large, organized, unified faction, regardless of their political rights or lack thereof. As one writer has suggested, "The class of resident aliens, to begin with, includes enormously variegated groups in terms of country of origin, reason for emigrating, age, race, income and so on; they are likely to have more in common with particular groups of citizens than they are with each other."[71] Nor is it clear that financially well-off, well-educated, English-speaking, established immigrants will have a strict identity of interest with other immigrants lacking these advantages, even if they are of the same national or ethnic group. Thus, although an open entry policy might in a limited sense increase the low-level frictions of factional activity, it might also dampen the adverse effects of faction overall. In sum, the "absorptive capacity"[72] of a state for additional, more diverse immigration is partly a function of whether the political system is designed to operate best in an environment of many and diverse factions, as ours presumably was.

Other processes may also tend to mitigate social conflict related to immigration. Whether future immigrants incline toward assimilation or not,[73] they will likely tend—at least for a time—to engage in geographical and cultural "enclaving," in which new immigrants voluntarily seek first the community of others with similar backgrounds.[74] The voluntary concentration of immigrants of a particular background in a particular area or areas is presumably, in many respects, in their social and eco-

70. *See* THE FEDERALIST NO. 10, at 61-62 (James Madison) (Edward Mead Earle ed., 1937); *see also* DAVID F. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 105-06 (1984) (discussing Madison's theory that large republics, like United States, are "immune to the dangers of faction"); MORTON WHITE, PHILOSOPHY, *THE FEDERALIST*, AND THE CONSTITUTION 141-42 (1987) (discussing Madison's view that large numbers of factions tend to protect minority interests). It is unclear whether there is any correlation between ethnic strife and the number of ethnic groups within a society, at least beyond some low threshold number.

71. Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1447 (1993).

72. *See* Nafziger, *supra* note 38, at 847.

73. *See* Aleinikoff, *supra* note 31, at 31 n.84 ("We live in post-assimilationist days."); *see also* Hing, *supra* note 66 (discussing flaws in assimilationists' positions regarding immigration).

74. *See, e.g.*, Hudson, *supra* note 32, at 218; Schuck, *supra* note 21, at 46.

nomic interest.[75] Thus, the inevitable strains of immigration are not felt on a geographically uniform basis.[76] At least initially, such strains and their costs would fall on or even be naturally reduced or avoided in immigrant communities themselves, rather than on areas of the country with small or nonexistent recent immigrant communities. Whatever its deficiencies, this voluntary enclaving phenomenon would seem to mitigate any broader, society-wide cultural strains of immigration.

Additionally, the degree to which the sheer number of new immigrants would promote cultural conflicts should not be overestimated. An open entry policy is not a compelled entry policy, or even a subsidized entry policy. The number of persons who would voluntarily leave their native land to live permanently in the United States under an open entry policy, independent of any incentives or disincentives available to any government, including our own, should not be casually assumed to be enormous.

Without denying the disparities in opportunity available in the United States and the poorest nations, it remains true that persons "who are immersed in a particular way of life will find it difficult to reject it, or to sever their emotional ties with it."[77] Professor Alan Dowty elaborates the point in the following common-sense terms:

> Most people have no inclination to leave their native soil, no matter how onerous conditions become. Would-be emigrants must fight off the ties of family, the comfort of familiar surroundings, the rootedness in one's culture, the security of being among "one's own," and the power of plain inertia. Conversely, being uprooted carries daunting prospects: adjusting to alien ways, learning a new language, the absence of kith and kin, the sheer uncertainty of it all.[78]

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75. *See* Schuck, *supra* note 21, at 46; *see also* Alejandro Portes & Julia Sensenbrenner, *Embeddedness and Immigration: Notes on the Social Determinants of Economic Action*, 98 AM. J. SOC. 1320, 1334-35 (1993) (discussing availability of character-based loans in Miami's Cuban community, where loans could be enforced through ostracism, and when loans on basis of reputation would presumably be unobtainable in broader banking system).

76. *See* FRANK D. BEAN ET AL., OPENING AND CLOSING THE DOORS: EVALUATING IMMIGRATION REFORM AND CONTROL 112 (1989).

77. Galloway, *supra* note 13, at 302.

78. DOWTY, *supra* note 41, at 223; *see also* WALZER, *supra* note 38, at 38 (stating that most persons are "inclined to stay where they are unless their life is very difficult there"); *cf.* ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY 98 (1970) (referring to conditions of "the high price or the 'unthinkability' of exit"). Of course, the enclaving phenomenon, along with the possibility of immigrating as an extended family unit, tends to reduce some of these costs.

One implication, of course, is that a merely open but unsubsidized entry policy may disproportionately benefit persons other than the most chronically poor. To the extent that poverty is associated with traditionalism or limited exposure to modern technological culture, these persons may tend to be among those least willing and able to emigrate.[79]

It is plausible to assume that as communication technologies expand, more people will be made aware of the opportunities afforded by life in the United States.[80] On the other hand, better communications may also reinforce any perceptions of the United States as a strange, culturally or spiritually alien, and perhaps occasionally dangerous, place. In any event, the desire not to enter or remain permanently in the United States depends not solely upon ignorance, but upon basic values.[81]

Finally, it is worth briefly mentioning in this context an argument that is further developed below. The actual level and composition of immigration under an open entry policy will likely depend, over time, on a wide range of practically alterable United States government policies regarding matters such as minimum wage rates, industry subsidies, health and welfare benefits, and various political, civic, and voting rights.[82] Thus, it is extremely important to decouple the potential effects of an open entry policy from any particular set of such background policies. The consequences of an open entry policy may vary widely, depending upon which background assumptions are chosen. For various reasons, then, assuming an inevitable "tidal wave" of permanent new immigrants under any open entry policy is unrealistic.

D. Open Entry, Employment, and Economics

Whatever the importance of broad cultural conflicts, there is clearly a sense in which narrow economic and employment-related issues are

79. *See* DOWTY, *supra* note 41, at 158.

80. *See* Judith Lichtenberg, *Mexican Migration and U.S. Policy: A Guide for the Perplexed*, *in* THE BORDER THAT JOINS, *supra* note 42, at 13, 21-22.

81. *See, e.g.*, Gerald P. López, *Undocumented Mexican Migration: In Search of a Just Immigration Law and Policy*, 28 UCLA L. REV. 615, 678 (1981) ("While undocumented Mexicans fully appreciate the value of superior wages, . . . they nonetheless prefer life in Mexico because it accords in many other ways with what they value on a day-to-day basis."); *see also id.* at 691 ("[O]ne study indicates that even if offered permanent status in the United States, most Mexicans would still rather live in Mexico and temporarily migrate for wage-labor."); *id.* at 692 ("Despite years of continual contact, most Mexican migrants remain uninterested in permanent relocation."). Limited rates of entry into the mainland United States from United States Commonwealth countries or territories may also reflect the cultural or psychological costs of entry. Finally, consider the inability or disinclination of some U.S. citizens to move to areas of greater economic opportunity, despite far lower costs of movement in all respects than most would-be immigrants would have to incur.

82. *See infra* part II.D.

fundamental to evaluating immigration policies. These concerns are multidimensional. Among the most prominent concerns are fears of job displacement of native workers by immigrants,[83] fears that increased job competition with immigrants will significantly reduce United States wage rates,[84] and a variety of fears to the effect that an open entry policy would involve enormous net economic costs, at least to current citizens.[85]

As to the first of these concerns, the available evidence of displacement of native workers by new entrants is, perhaps surprisingly, quite weak. Professor George Borjas has concluded that "modern econometrics cannot detect a single shred of evidence that immigrants have a sizable adverse impact on the earnings and employment opportunities of native citizens in the United States."[86] Viewing matters of employment as simply a zero-sum competition between immigrants and native U.S. citizens, or African-American workers in particular, is thus a gross oversimplification at best.[87]

Job competition may, for example, be muted by any willingness of immigrants to take jobs that would otherwise go unfilled or abolished.[88] More positively, immigrants generate economic demand for the employ-

83. The Supreme Court has on several occasions observed that a " 'primary purpose in restricting immigration is to preserve jobs for American workers.' " INS v. National Ctr. for Immigrants' Rights, Inc., 112 S. Ct. 551, 558 (1991) (quoting Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 893 (1984)); *see also* GEORGE J. BORJAS, FRIENDS OR STRANGERS: THE IMPACT OF IMMIGRANTS ON THE U.S. ECONOMY 81 (1990) ("Some observers assert that immigrants take jobs away from natives: as immigrants enter the labor market, natives are displaced from their jobs."); JULIAN L. SIMON, THE ECONOMIC CONSEQUENCES OF IMMIGRATION 209 (1989) (arguing that although some displacement must occur, it may be offset by beneficial effects); Thomas Muller, *Economic Effects of Immigration*, *in* CLAMOR AT THE GATES 109, 111 (Nathan Glazer ed., 1985) ("Under some conditions immigrants are substitutes for domestic workers, while under other circumstances they are complements."); Michael Piore, *Can International Migration Be Controlled?*, *in* ESSAYS ON LEGAL AND ILLEGAL IMMIGRATION 21, 30 (Susan Pozo ed., 1986) ("[A]n immigration process which begins initially as essentially complementary to the needs and aspirations of U.S. nationals [produces] a second generation and a growing crop of first generation immigrants who are in competition with American nationals for stable career jobs."); Teitelbaum, *supra* note 11, at 37.

84. *See, e.g.*, MICHAEL C. LEMAY, FROM OPEN DOOR TO DUTCH DOOR 6 (1987) (referring to fear that vast influx of immigrants "will destroy the economy or at least severely depress wages and working conditions").

85. *See id.*; GARRETT HARDIN, STALKING THE WILD TABOO 238 (2d ed. 1978) (unrestricted immigration as leading to environmental devastation via "ruinous system of the commons"); Anne Dobson-Mack, *Independent Immigrant Selection Criteria and Equality Rights: Discretion, Discrimination and Due Process*, 34 CAHIERS DE DROIT [C. DE D.] 549, 552 n.6 (1993).

86. BORJAS, *supra* note 83, at 81; *see also* PAUL R. EHRLICH ET AL., THE GOLDEN DOOR 360 (1981) ("There is . . . little reason to believe that illegal aliens are taking jobs away from Americans in significant numbers . . . .").

87. *See* Muller, *supra* note 83, at 120-21.

88. *See id.* at 112; Piore, *supra* note 83, at 28-29.

ment of nonimmigrants,[89] start new businesses that employ other persons,[90] and in general enhance long-term capital formation.[91] To the extent that these benefits occur only in the long run, politicians facing reelection campaigns in the short term may tend to unduly discount such benefits when legislating on immigration policy, to the prejudice of the public interest.[92] More generally, the nonvoting status of persons wishing to enter the United States tends to bias immigration policy into morally undervaluing the interests of would-be entrants.[93]

Relatedly, there is understandable concern that increased immigration would significantly drive down wages and working conditions.[94] But for reasons analogous to those referred to above in connection with issues of job displacement, such effects at best are difficult to document. Immigration can in fact have positive effects on general wage levels.[95] Although the matter is not free from doubt,[96] it has been argued that "a 10-percent increase in the number of immigrants *increases* the average African-American wage by about .2 percent."[97] On the other hand, the same increase in immigration may also have a small adverse effect on the wages of African-American wage earners who are young,[98] and there certainly can be no guarantee that these wage effects must remain constant at any level and composition of immigration. It seems clear, though, that any such adverse effects on wage levels of young African-Americans could be completely negated or compensated for by other federal tax, training, job development, or transfer programs, without reducing immigration.[99] Funding for such compensatory programs could draw upon the fact that reductions in wage rates may generate increased profits, or

89. *See, e.g.*, Muller, *supra* note 83, at 121 (discussing increased demand for teachers in Los Angeles).

90. *See* SIMON, *supra* note 83, at 250.

91. *See* Muller, *supra* note 83, at 112.

92. *See id.*; *see also* GEOFFREY BRENNAN & JAMES M. BUCHANAN, THE REASON OF RULES 81, 93 (1985) (stating that participants in political decision making normally do not base decisions on sufficiently long time horizon).

93. For background, see JOHN HART ELY, DEMOCRACY AND DISTRUST 82-87 (1980). For more specific application, see Hudson, *supra* note 32, at 209-10 and *Developments in the Law*, *supra* note 11, at 1357.

94. *See, e.g.*, Teitelbaum, *supra* note 11, at 38-39.

95. *See* BEAN ET AL., *supra* note 76, at 111.

96. *See* LEMAY, *supra* note 84, at 135.

97. BORJAS, *supra* note 83, at 88 (emphasis added).

98. *See id.* ("[A] 10-percent increase in the number of immigrants reduces the earnings of young blacks, a group that is particularly sensitive to changes in economic conditions, by only .1 percent." (footnote omitted)).

99. For related discussion, see *infra* note 110 and accompanying text.

may benefit consumers in the form of lower prices of goods manufactured with such labor.[100]

Finally, whether an open entry policy would have other extremely harmful economic consequences, on net, is doubtful in the extreme. Such have hardly been the consequences of immigration historically.[101] And while it is possible to argue that current or prospective immigrants will make fewer significant contributions, or will otherwise acquit themselves less gloriously than past waves of immigrants, this argument itself has greeted virtually every generation of United States immigrants.[102] Any argument that recent immigrants have adapted poorly or that they will not, in the aggregate, continue the past pattern of immigrant success seems premature at best.[103] There is no obvious reason why future entrants would, for example, be less interested in long-term educational investments in their own human capital, and in that of their children, than native-born citizens currently seem to be.[104]

In the meantime new immigrants add to the local, state, and federal tax bases, and reduce every citizen's share of the cost of public goods, such as defense, that are to some degree insensitive to population size.[105] Given our enormous current national debt,[106] new entrants are in effect agreeing to help bear the cost of past U.S. consumption,[107] the enjoyment

100. *See* BORJAS, *supra* note 83; at 222.

101. For an entertaining survey of historical examples, see 1 JEAN BODIN, THE SIX BOOKS OF A COMMONWEALE 62 (Kenneth D. McRae ed., 1962).

102. Paul Douglas, the economist and future U.S. Senator, observed in 1919 that "it is the custom of each generation to view the immigrants of its day as inferior to the stock that once came over." BORJAS, *supra* note 83, at 133.

103. *See, e.g.*, Glazer, *supra* note 56, at 259 (discussing long-term successful economic adaptation of U.S. immigrant groups); Portes & Sensenbrenner, *supra* note 75, at 1333 (recounting widely unanticipated success of recent Dominican immigrants in New York City).

104. Admittedly, new entrants earning below-average wages may, despite their complementarity, decrease the average wage per wage earner. As discussed, however, evidence is lacking that this perfectly understandable statistical development has dramatic adverse long-term consequences for the society, given the tendency of new entrants' skill levels and wages to rise over time.

105. *See* BORJAS, *supra* note 83, at 161. Note also the Supreme Court's observation in *Plyler v. Doe* that "[t]here is no evidence in the record suggesting that illegal entrants impose any significant burden on the State's economy. To the contrary, the available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the state fisc." 457 U.S. 202, 228 (1982). Of course, to the extent that undocumented aliens underutilize public services solely out of a fear of detection and deportation, such a disincentive would be absent under an open entry policy. But underutilization may also be a matter of age profiles and other demographics. In any event, access of new entrants to public services can be intentionally increased or decreased through expanding or contracting statutory eligibility, apart from immigration policy.

106. *See, e.g.*, BENJAMIN FRIEDMAN, DAY OF RECKONING: THE CONSEQUENCES OF AMERICAN ECONOMIC POLICY UNDER REAGAN AND AFTER (1988).

107. *See* Hudson, *supra* note 32, at 218-19.

of which they presumably did not directly share. If the United States is to "grow" its way out of such indebtedness by effectively competing in an increasingly international, multilingual, and multicultural economy,[108] future immigrants ultimately have an even more significant role in the process.[109]

As is true of any policy, open entry involves some costs that would not be incurred under a more restrictive immigration policy. I have shown above how, at least in certain cases, job competition may produce winners and losers.[110] In such cases, and more generally, sound public policy may require that the direct and indirect beneficiaries of an open entry policy fully or partially compensate those who suffer loss from such a policy. The basic point is simply that the choice need not be between foregoing an open entry policy or allowing all costs of such a policy to remain on those who initially bear them. All of these costs can be shifted by governmental action, through subsidies, taxes, redistributive programs, or other mechanisms. Fairly judging an open entry policy thus

108. *See generally* Hing, *supra* note 66, at 882 (discussing growth of international economic community).

109. Several additional possible concerns may be of interest to some. Consider in turn the beliefs that immigrants commit some class of serious crimes in substantially disproportionate numbers; that immigrants will have disproportionately large numbers of children, such as to substantially burden the United States economy; and that the international AIDS epidemic significantly affects the attractiveness of an open entry policy. See, for example, SIMON, *supra* note 83, at 104, for brief responses to the first two of these concerns; see also Whelan, *supra* note 63, at 467, for an exploration of concerns with both expanding and restricting United States immigration policy. Additionally, studies have, perhaps surprisingly, documented recent reductions in birth rates and desired family size in developing nations. These reductions have occurred even in the absence of national economic growth or improved living conditions, which were previously thought of as prerequisites for such demographic changes. Bryant Robey et al., *The Fertility Decline in Developing Countries*, SCI. AM., Dec. 1993, at 60. Finally, the number of HIV-positive persons among potential immigrants is likely to reflect not only the financial burdens of immigrating, but the relative cost, accessibility, and efficacy of present and future AIDS treatments in the United States and elsewhere. *See* Chad Baruch & Franc Hangarter, *Guess Who's Coming to America: An Analysis of United States HIV-Related Immigration Policies*, 32 WASHBURN L.J. 301, 312-13 (1993); Jason W. Konvicka, Note, *Give Us Your Tired, Your Poor, Your Huddled Masses... Except When They Have HIV*, 27 U. RICH. L. REV. 531 (1993); *see also* Juan P. Osuna, *The Exclusion from the United States of Aliens Infected with the AIDS Virus: Recent Developments and Prospects for the Future*, 16 HOUS. J. INT'L L. 1 (1993) (examining future of exclusion policy).

More generally, it seems implausible that persons physically and financially able to migrate to the United States will also be so ill or infirm as to burden the public health care system disproportionately, regardless of what level of care is provided for new entrants as a matter of statutory eligibility.

110. Schuck, *supra* note 21, at 37-38; *see supra* notes 97-99 and accompanying text. Not surprisingly, localities bearing what they perceive as disproportionate net costs of immigration may seek federal reimbursement or federal subsidy of all or part of such costs. *See* Muller, *supra* note 83, at 126-27.

requires the critic of open entry to consider the morally attractive, feasible mechanisms by which costs of open entry may be shifted.

Even more broadly, an assessment of an open entry policy requires breaking any arbitrary or contingent linkage between immigration policy and any other government policy. The right to enter the country must be conceptually decoupled from other areas of law and policy. By way of analogy, consider arguments in favor of capital punishment that emphasize, for example, the relatively short sentences served by some murderers, the possibility of the subsequent murder of prison guards, or the failure of prison inmates to contribute to their own maintenance, or to make even symbolic restitution to the families of their victims.

But to reasonably evaluate capital punishment, a critic must, among other things, consider feasible alternative correctional worlds without capital punishment, but in which murderers serve genuine life terms, are physically isolated from prison guards, and to the extent possible, make such restitution from their own labor.

Similarly, it is important to evaluate open entry policies in the context of alternative feasible sets of any related background policies that may dramatically affect the attractiveness of an open entry policy.[111] Fundamental principles of economics suggest, for example, that the number of entrants may be alterable by modifications in the broad system of benefits awaiting new entrants.[112]

If the general public, for example, is unwilling to tolerate the level of immigration attributable to the attraction of particular levels of welfare or other benefits for new entrants,[113] the public may respond either by limiting immigration, or to some limited degree, by reducing welfare or other benefit levels available to future entrants.[114] If it wishes to, the public could minimize other perceived costs of open entry by, for exam-

111. For a discussion of the dependence of immigration policy on a number of background variables, see Stephen H. Legomsky, *Immigration, Equality and Diversity*, 31 COLUM. J. TRANSNAT'L L. 319, 323 (1993).

112. *See* SUSAN GONZÁLEZ BAKER, THE CAUTIOUS WELCOME: THE LEGALIZATION PROGRAMS OF THE IMMIGRATION REFORM AND CONTROL ACT 194 (1990).

113. *See* BORJAS, *supra* note 83, at 150-51; Ronald A. Cordero, *Law, Morality, and La Reconquista*, 4 PUB. AFF. Q. 347, 355 (1990); Robert E. Goodin, *If People Were Money*, *in* FREE MOVEMENT, *supra* note 10, at 6, 11 ("A particularly generous welfare state will always be at risk of being swamped with immigrants, so long as it allows people to move in freely from abroad."); Hudson, *supra* note 32, at 222 ("[T]he welfare state is incompatible with unrestricted immigration . . . .").

114. In practice, the relative importance of immigration "pull" factors such as jobs, higher wages, better educational opportunities, or welfare benefits compared to "push" factors in the potential immigrant's own native country may be difficult to sort out. *See* SIMON KUZNETS, TOWARD A THEORY OF ECONOMIC GROWTH 41-43 (1968). And of course, I am merely stipulating that some potential entrants would stay home but for the United States welfare

ple, enforcing higher or lower minimum wage rates—generally or in particular industries.

There is, admittedly, no guarantee that the public will be willing to accept open entry on the basis of a package of rights and benefits for future entrants that is even minimally consistent with the demands of justice or the equal protection rights of future entrants. The public should at least be able to grasp the utter foolishness of denying benefits, such as vaccinations and other forms of health care, and education, when providing such benefits would have important positive externalities. At least emergency provision of basic life necessities may be politically feasible.

Whether the public could insist, to any degree, on reducing benefits available to future entrants while still acting justly toward those entrants—and not unconstitutionally conditioning their entry—is of course controversial.[115] Such a course hardly seems morally attractive. Under the United States Constitution, it is generally impermissible to favor established state residents over new entrants to a state.[116] Still, it seems irresponsible to ignore the possibility that insisting on equal benefit rights for future new entrants may mean, as a matter of practical politics, that no open entry policy can be enacted. Realistically, the only viable choice may be between open entry with a minimally reduced benefits package for future new entrants only, and a more restrictive immigration policy.

Faced with this choice, the case for open entry is surprisingly strong. For example, consider the choices based on fair and equal consideration of "the interests of all those affected, either directly or indirectly, whether as an immediate result of the policy, or in the long run."[117] The enhanced or preserved benefit levels available to those lucky enough to gain entry in the future must somehow be considered in the context of the assumed public refusal to grant entry to some number

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system; the number of such persons in actuality could conceivably be small for various cultural reasons.

115. *See, e.g.*, Nickel, *supra* note 42, at 37 (arguing that human rights transcend alienage or citizenship status); Peter L. Reich, *Jurisprudential Tradition and Undocumented Alien Entitlements*, 6 GEO. IMMIGR. L.J. 1 (1992); Peter L. Reich, *Public Benefits for Undocumented Aliens: State Law into the Breach Once More*, 21 N.M. L. REV. 219 (1991). Also of note in this context are several statements by Cardinal Roger M. Mahony. *See, e.g.*, Larry B. Stammer, *Mahony Blasts Political Stance on Immigrants*, L.A. TIMES, Oct. 9, 1993, at B1.

116. *See* Shapiro v. Thompson, 394 U.S. 618, 632-33 (1969) (discussing violation of Equal Protection Clause in apportioning benefits on basis of length of residency or past tax contributions); *see also* Zobel v. Williams, 457 U.S. 55 (1982) (holding that Alaska's distribution of oil revenue, based on length of residence or past contributions to state, unconstitutional under Equal Protection Clause of Fourteenth Amendment).

117. Peter Singer & Renata Singer, *The Ethics of Refugee Policy*, *in* OPEN BORDERS? CLOSED SOCIETIES?, *supra* note 34, at 111, 121.

of future would-be entrants. It is hardly implausible that denying entry works a more substantial hardship than allowing entry, but only at reduced government benefit levels.

Insisting upon full benefits for future new entrants, even if this inevitably means denying entry to many others, actually has a lottery-like quality. Such a policy promotes extreme disparities in well-being. Independent of anyone's efforts or deserts, there arises a favored or "jackpot" class of persons who both enter and find relatively great benefit programs available, and a large "loser" class of persons who are denied entry and, of course, those high benefit levels. Such a system seems not so much liberal or generous as morally arbitrary.[118] When we then add in any obligations we may have to ensure that the United States remains a place of great economic opportunity for future generations of natives and immigrants alike,[119] the case for paying large benefits to future new immigrants—if at the inevitable expense of restricting immigration and the jeopardy of future generations—seems even more dubious. There seems no clear reason, in particular, to favor new immigrants at the expense of persons who will consider the possibility of immigrating over the next several generations.

This, however, is not the end of any moral complications. It may be either practically necessary or morally desirable to take the further step of decoupling open entry even from voting rights for future first generation immigrants, at least for a time, at any level of government. Doubtless it is at least initially appealing to require that "every new immigrant . . . be offered the opportunities of citizenship."[120] But the general populace may become convinced that new entrants may, through voting, undermine general liberal democratic goals,[121] or liberal democracy itself.[122] More pointedly, subordinated or oppressed groups within the United States may fear that enfranchisement of many new immigrants from illiberal cultures may retard or reverse contemporary progressive

118. It is, by way of analogy, occasionally alleged that certain aspects of the tort system result in overcompensating a few plaintiffs while leaving others undercompensated, or not compensated at all. *See* JEFFREY O'CONNELL, THE LAWSUIT LOTTERY (1979).

119. *See, e.g.*, WILLIAM A. GALSTON, JUSTICE AND THE HUMAN GOOD 251 (1980) ("[I]ndividuals may be asked to live poorly for the sake of the comfort and development of future generations . . . ."). For additional and sometimes dissenting views in this general area, see, for example, RESPONSIBILITIES TO FUTURE GENERATIONS: ENVIRONMENTAL ETHICS (E. Partridge ed., 1981), Martin Golding, *Obligations to Future Generations*, 56 THE MONIST 85 (1972), and Peter Laslett, *The Conversation Between the Generations*, *in* PHILOSOPHY, POLITICS AND SOCIETY 36 (Peter Laslett & James Fishkin eds., 5th ed. 1979).

120. WALZER, *supra* note 38, at 62.

121. *See* Nickel, *supra* note 42, at 39.

122. *See* BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 93-95 (1980).

political trends. The point of such franchise restrictions, of course, is not to facilitate oppression of new entrants,[123] but to protect fragile and developing recognition of the rights of current minority citizens.

At a minimum potential entrants are entitled, prior to entry, to a reasonably clear and reliable description of the relevant limitations, if any, to be imposed on their franchise and other civic rights. Such disclosure would at least allow potential entrants to make an informed choice as to entry, without clearly denying their constitutional rights upon entry.[124] Presumably, any necessary franchise restrictions may deter at least a few potential entrants, while being understandably viewed by others as a small price to pay.

III. OPEN ENTRY AND OBLIGATIONS TO NEIGHBORS AND STRANGERS

To show that an open entry policy is feasible is not, admittedly, to show that it is morally or constitutionally sound. It has been argued that "it is in its immigration laws that a state most starkly asserts the primacy of state interest over universal principles of justice."[125] Few states, however, would concede the injustice of their failure to adopt an open entry policy. One obvious line of defense would be for states to argue that just as persons owe stronger moral obligations to their own family members than to strangers, so states bear stronger moral obligations to their own citizens or current residents than to foreigners.[126]

123. *See* Teitelbaum, *supra* note 11, at 58; *cf.* Etienne Balibar, *Propositions on Citizenship*, 98 ETHICS 723, 728 (1988) (discussing "French character" supremacist movements). Again, the real choice may be between new entrants with no voting rights, and far fewer entrants. The worth of their rights to vote in the nation from which persons wish, but are unable, to emigrate, may be limited. Similarly, any right to vote in the United States that a would-be entrant could exercise, but for being denied entry into the United States, may also be of limited value.

124. The Supreme Court has dismissed for want of a substantial federal question the appeal of a decision by the Colorado Supreme Court that the denial of the franchise to resident aliens does not violate the Equal Protection Clause. *See* Skafte v. Rorex, 533 P.2d 830 (Colo. 1976), *appeal dismissed*, 430 U.S. 961 (1977). For a range of academic views on the merits, see Gerald L. Neuman, *"We Are the People": Alien Suffrage in German and American Perspective*, 13 MICH. J. INT'L L. 259 (1992), Raskin, *supra* note 71, Gerald M. Rosberg, *Aliens and Equal Protection: Why Not the Right to Vote?*, 75 MICH. L. REV. 1092 (1977), and Paul Tiao, Note, *Non-Citizen Suffrage: An Argument Based on the Voting Rights Act and Related Law*, 25 COLUM. HUM. RTS. L. REV. 171 (1993); see also SIMON, *supra* note 83, at 348, noting the withholding of voting rights as one way of safeguarding against the possibility of political "invasion" by large foreign state.

125. Dummett, *supra* note 31, at 170.

126. *See, e.g.*, Aleinikoff, *supra* note 59, at 242 ("If we 'owe' more to family than to friends, to friends more than strangers, perhaps we owe more to those who have thrown their fates in with ours than to those who have not yet entered the country."); Charles R. Beitz, *Cosmopoli-*

With the general idea of specially stringent obligations to one's dependents or to those to whom one has special commitments, there need be no quarrel.[127] Certainly, a principled unwillingness to, for example, rescue one's own innocent relatives first would commonly be thought peculiar.[128] We generally know the needs, resources, and limitations of our compatriots better than those of distant strangers, so we may be able to aid those near to us more effectively and at lower cost.[129] It is also possible that seeking to extend the bonds of moral loyalty too far would result in indifference to nearby suffering.[130] Finally, we should be wary of pressing too hard against even an arbitrary or apparently irrational but widespread bias in favor of those close to us.[131]

These considerations, however, do not substantially undermine the moral case for open borders. The logic of open borders does not depend upon some unappealing or unsustainable version of universalism or absolute impartiality among persons. We need not maintain that relationships, voluntary or involuntary, are of no special moral import,[132] or that cosmopolitan concerns must invariably trump narrower, more parochial interests.

The more appropriate argument is instead, roughly, that the interests of would-be voluntary entrants into the United States cannot be dismissed or flatly subordinated to all legitimate interests of current United

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tan Ideals and National Sentiment, 80 J. PHIL. 591, 597 (1983) (" '[S]tates can . . . legitimately favor their own populations—though not at any cost whatever to the rest of the world.' " (quoting THOMAS NAGEL, MORTAL QUESTIONS 84 (1979))); Hendrickson, *supra* note 31, at 223; I.M.D. Little, *Ethics and International Economic Relations*, *in* FREE MOVEMENT, *supra* note 10, at 48, 51 ("[U]tility has to be weighted by social distance; charity begins at home."); Andrew Oldenquist, *Loyalties*, 79 J. PHIL. 173, 182 (1982) (stating that "sometimes what benefits my family obligates me more than does a greater benefit to the whole of humanity"); *Developments in the Law*, *supra* note 11, at 1290 (stating that aliens' claims "may be overridden by claims of those already here who have contributed to their communities but who, because of a continuing influx of immigrants, face unemployment and poverty").

127. *See* Philip Pettit & Robert Goodin, *The Possibility of Special Duties*, 16 CANADIAN J. PHIL. 651, 652 (1986).

128. *See* Oldenquist, *supra* note 126, at 186.

129. *See* Sinopoli, *supra* note 47, at 523. *See generally* David Miller, *The Ethical Significance of Nationality*, 98 ETHICS 647 (1988) (defending ethics of aiding compatriots over outsiders).

130. *See* GEORGE P. FLETCHER, LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS 20 (1993).

131. *See, e.g.*, Martin, *supra* note 48, at 217 (citing Anthony T. Kronman, *Talent Pooling*, *in* 23 NOMOS: HUMAN RIGHTS 58, 77 (1981)). For references to sociobiological discussions of the survival value of favoring close genetic relatives, see John H. Beckstrom, *The Potential Dangers and Benefits of Introducing Sociobiology to Lawyers*, 79 NW. U. L. REV. 1279 (1985).

132. For a brief discussion of the moral importance of relatedness, see R. George Wright, *Should the Law Reflect the World?: Lessons for Legal Theory from Quantum Mechanics*, 18 FLA. ST. U. L. REV. 855, 864-70 (1991).

States citizens or residents. Thus the issue need not be thought of as whether foreigners are in all respects and for all purposes the precise moral equals of citizens, but again rather roughly, whether foreigners or would-be entrants are morally entitled to at least some relevant level of concern and respect with regard to their vital interests.

An open entry policy thus need not be incompatible with national loyalties, patriotism, or even with national chauvinism. Nor need open entry undermine our ability to form what the philosopher Michael Sandel has described as identity-constitutive attachments.[133] Most clearly, we need not view the assets of our fellow citizens merely as resources that ought to be placed at the unfettered disposal of any would-be entrant.

Part of the resistance to open entry may stem from a misleading dichotomy between special moral obligations owed to particular persons bearing particular statuses and general moral obligations owed universally.[134] An open entry policy implicitly refers only to a class of persons voluntarily desirous of and otherwise capable of entering the United States. Obligations could be owed to such persons distinct from those owed to all humans, all rational agents, or all moral persons. Thus we may owe what can in a sense be called relativized or dependent obligations to all would-be entrants. We might call our obligations to such persons particularized or special obligations, as we might call our obligations to our own family.

No plausible moral or legal rule absolutely subordinates our obligations to broad groups of people to those we bear only to a few, or absolutely subordinates the distant to the near. We have admittedly become used to the idea that in immigration cases, conservation of the public fisc may suffice to justify refusal of entry.[135] In these cases more localized rights or interests are thought to trump broader concerns. But cases such as *Shapiro v. Thompson*[136] and *Plyler v. Doe*[137] can sensibly be read

133. *See* Martin, *supra* note 48, at 217 n.194 (citing MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 179 (1982)).

134. The idea of special duties, by itself, may thus be of limited value in our context. *But cf.* Pettit & Goodin, *supra* note 127, at 655 (placing substantial weight on distinction between relativized and nonrelativized moral duties).

135. *See* Richard F. Hahn, Note, *Constitutional Limits on the Power to Exclude Aliens*, 82 COLUM. L. REV. 957, 984 & n.184 (1982) ("The decision whether or not to admit an alien may impinge on . . . the conservation of the nation's economic resources.") (citing Nishimura Ekiu v. United States, 142 U.S. 651 (1892)).

136. 394 U.S. 618 (1969).

137. 457 U.S. 202 (1982). For general discussion, see Lichtenberg, *supra* note 11, and Michael J. Perry, *Equal Protection, Judicial Activism, and the Intellectual Agenda of Constitutional Theory: Reflections On, and Beyond,* Plyler v. Doe, 44 U. PITT. L. REV. 329 (1983).

as endorsing a contrary result. At the national level, *Shapiro* concludes that "a State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally."[138] And while *Plyler* concludes that a state's denial of public education to undocumented children actually undermines the broader public interest,[139] the case can be read as finding no state interest sufficiently substantial to outweigh the harm visited upon the undocumented children, even if denying such children a public school education would tend to preserve the public fisc.[140]

Thus, strength of moral obligation is not invariably a function of proximity, spatial or cultural.[141] Martyrs, for example, may fail to provide for the welfare of their immediate relatives. If we could, with the push of a button, permanently end torture of a large group of distant strangers, somehow at the unavoidable cost of breaking a promise to some friends and at some minimal cost to those friends, we might well seem justified in doing so. More generally, it is hardly clear that promoting the narrow national interest should invariably be the aim of public policies bearing upon human rights and upon important interests of persons beyond our national borders. Pointing to the real or alleged sovereignty of the nation-state simply begs the question. Even if we recognize the fact of national legal sovereignty, it remains "a mystery why we should regard the national point of view as having the kind of significance for morality that attaches naturally to the personal point of view."[142]

It may well be that positive international law remains more comfortable with the idea of states, as opposed to individual persons, as the bearers and enforcers of rights.[143] There is, however, a strong countervailing tendency to recognize persons as rights bearers.[144] There is as well a

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Presumably, the logic of *Plyler* could be extended to matters such as inoculations against contagious diseases and related public health matters, but the precise appropriate scope of *Plyler* is obviously controversial.

138. 394 U.S. at 631.

139. 457 U.S. at 230.

140. *See id.* at 228-30.

141. *See* Henry Shue, *Mediating Duties*, 98 ETHICS 687, 692 (1988).

142. Beitz, *supra* note 126, at 598.

143. RICHARD B. LILLICH, THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW 1-3 (1984); Scaperlanda, *supra* note 31, at 970 (noting that persons are to some degree still objects, and not subjects, in international legal sphere).

144. *See, e.g.*, IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 46 (Lewis White Beck trans., 1959) ("[R]ational beings are designated 'persons' because their nature indicates that they are ends in themselves, i.e., things which may not be used merely as means."); Scanlan & Kent, *supra* note 34, at 68; *see also* Schuck, *supra* note 21, at 2 (stating that entitlement of rights derives not from particulars of one's time, place, or status, but from

tendency to recognize that some of these rights are held simply by virtue of one's status as a person, or at least upon grounds independent of the arbitrary contingency of one's place of birth or native citizenship.[145] Finally, there is a tendency to recognize a moral right, or otherwise attach substantial moral weight, to every person's right to broad freedom of movement.[146]

Familiar legal policy recognizes in some contexts the general moral arbitrariness of distinguishing among persons on grounds of national origin.[147] The ultimate moral arbitrariness of deliberately conferring or withholding the most substantial benefits on the basis of national origin or place of birth in the context of immigration is less clearly established.[148] Allegations of discrimination on the arbitrary basis of national origin arise in the context of relative shares of a more or less fixed total ceiling of immigrants annually.[149] It is less common, however, to go beyond disputes among groups as to their fair relative shares of an as-

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one's humanity); Andrew E. Shacknove, *American Duties to Refugees: Their Scope and Limit*, *in* OPEN BORDERS? CLOSED SOCIETIES?, *supra* note 34, at 131, 137 ("Moral equality entails, at the least, a recognition of the elemental integrity of each human life.").

145. *See, e.g.*, ACKERMAN, *supra* note 122, at 95 ("Westerners are not entitled to deny this [entry] right simply because they have been born on the right side of a boundary line . . . ."); SCHUCK & SMITH, *supra* note 68, at 135 (describing current immigration law as "based upon a purely geographic coincidence—literally an accident of birth"); Carens, *supra* note 13, at 26 ("[L]imiting entry to countries like Canada is a way of protecting a birthright privilege."); Galloway, *supra* note 13, at 283 (discussing argument of Joseph Carens); Nickel, *supra* note 42, at 37 ("Human rights flow from one's humanity, not from one's citizenship status . . . ."); Schuck, *supra* note 21, at 85 (arguing that in truly liberal society, "exclusion based upon accidents of birth . . . would be odious"). For a broader philosophical discussion of the idea that an apparently morally arbitrary, unchosen, undeserved characteristic such as place of birth may or may not be a "relevant" ground of moral distinction, see, for example, R.M. HARE, FREEDOM AND REASON 107-08, 219 (1963), and more skeptically, R.M. HARE, MORAL THINKING 62-64 (1981).

146. *See, e.g.*, Zemel v. Rusk, 381 U.S. 1 (1965) (discussing constitutional right of foreign travel); Kent v. Dulles, 357 U.S. 116, 126 (1958) ("Freedom of movement across frontiers in either direction . . . was a part of our heritage [and considered to be] basic in our scheme of values . . . ."), *overruled on other grounds by* Califano v. Aznavorian, 439 U.S. 170 (1978); Carens, *supra* note 13, at 25 ("Liberal egalitarianism entails a deep commitment to freedom of movement as both an important liberty in itself and a prerequisite for other freedoms."); Nickel, *supra* note 42, at 32 (positing human right to freedom of movement); Hillel Steiner, *Libertarianism and the Transnational Migration of People*, *in* FREE MOVEMENT, *supra* note 10, at 87, 90-91 (noting libertarian opposition to general immigration restrictions beyond morally appropriate defense of value of valid contractual agreements and property rights); Whelan, *supra* note 64, at 13 (noting "negative" right to freedom of immigration as both enlarging "the sphere of individual liberty as well as being an equalizing welfare measure").

147. *See, e.g.*, Civil Rights Act of 1964 § 201, 42 U.S.C. § 2000a(a) (1988) (barring discrimination in public accommodations on, among other grounds, national origin).

148. *But see supra* note 145.

149. For a powerful argument discussing racist motivations underlying restrictions on entry by Haitians asserting refugee status, see Lennox, *supra* note 61.

sumedly fixed total sum of immigrants to the broader issue of the moral arbitrariness of any restrictive entry policy.

In general, neither United States immigration law, nor the academic criticism of the law, has come to grips with the apparent moral arbitrariness of allowing many persons to undeservedly suffer absolute or relative poverty, rather than permit them merely to enter the United States if they are otherwise able, where others with the equally undeserved good fortune to have been born in the United States resist even a largely passive or negative accommodation of the undeservedly less fortunate.

Of course, the issue of whether or when persons may be left, or made, to suffer even grievous harm by virtue of circumstances for which they cannot reasonably be held responsible is a broad one, extending well beyond the scope of this Article.[150] Few writers in any context go so far as to seek to completely eliminate all effects of all undeserved circumstances. Clearly, an open entry policy need not seek, for example, to compensate all entrants into the United States so as to neutralize all blameless suffering ever incurred by those entrants above some equitable baseline level. In many cases voluntary entry into the United States on any reasonable terms might well be thought by itself to outweigh one's net accumulated undeserved misfortunes. At a minimum allowing entry into the United States may often constitute at least a significant contribution toward redressing any such net imbalance of blameless misfortune.

An open entry policy is thus itself a broad attack on the problem of morally arbitrary suffering and inequality. Such a policy—however justified in terms of charity, utility, liberty, equality, autonomy, and self-realization, or rights to freedom of movement—begins with Kant's recognition that "[t]he birth is no deed of him who is born."[151] Kant speaks of "the right all men have, of demanding of others to be admitted into their society; a right founded upon that of the common possession of

150. Some related literature appears under the rubric of "moral luck." *See, e.g.*, THOMAS NAGEL, MORTAL QUESTIONS (1979); BERNARD WILLIAMS, MORAL LUCK (1981); Peter Breiner, *Democratic Autonomy, Political Ethics, and Moral Luck*, 17 POL. THEORY 550 (1989); Brynmour Browne, *A Solution to the Problem of Moral Luck*, 42 PHIL. Q. 345 (1992); Margaret Urban Coyne, *Moral Luck?*, 19 J. VALUE INQUIRY 319 (1985); Henning Jensen, *Morality and Luck*, 59 PHIL. 323 (1984); A.W. Moore, *A Kantian View of Moral Luck*, 65 PHIL. 297, 297-98 (1990) (noting that Plato and Kant believed that "our true worth . . . is something isolable and pure which is not subject to the contingencies and vicissitudes of our empirical surrounds but is itself, to some degree, transcendent"); Daniel Statman, *Moral and Epistemic Luck*, 4 RATIO 146 (1991); Note, *The Luck of the Law: Allusions to Fortuity in Legal Discourse*, 102 HARV. L. REV. 1862, 1863 (1989) (referring to our inclination to "readily—almost unthinkingly—accept the implicit suggestion that legal consequences, especially the imposition of sanctions, ought not to follow from 'fortuitous' events").

151. Immanuel Kant, *Essay on Theory and Practice*, *in* THE PHILOSOPHY OF KANT 418 (Carl J. Friedrich ed., 1949).

the surface of the earth . . . because originally one has not a greater right to a country than another."[152] As a potential qualification though, Kant suggests elsewhere that a government may encourage immigration over popular opposition as long as "the private ownership of the land of the natives is not diminished."[153] Certainly, an open entry policy need not involve anything like forced sales or condemning land for the benefit of new entrants.

Ultimately, an open entry policy emphasizes not the arbitrary contingencies of geopolitical natality, but the unconditional dignity of each person.[154] Respecting such dignity, for Kant, may require some degree of societal sacrifice or cost.[155] An open entry policy not only promotes human dignity in an exceptionally broad fashion, but also broadly promotes what Kant takes to be the purpose of law itself—"to guarantee each individual a maximum sphere of external freedom."[156]

The contemporary philosopher John Rawls follows Kant in seeking to control the influence of morally arbitrary contingencies on one's life chances. Rawls writes that "[t]he arbitrariness of the world must be corrected for by adjusting the circumstances of the initial contractual situation"[157] under which the basic principles of justice are to be derived. Notoriously, though, Rawls does not attempt to consider the implications of his basic assumptions for most questions of international or global justice or immigration.[158]

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152. IMMANUEL KANT, PERPETUAL PEACE 24 (Nicholas Murray Butler ed., 1939).

153. IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE § 50, at 109 (John Ladd trans., 1965).

154. *See, e.g.*, Oscar Schachter, *Human Dignity as a Normative Concept*, 77 AM. J. INT'L L. 848, 848-49 (1983).

155. *See, e.g.*, Cordero, *supra* note 113, at 360 (discussing Kant on moral obligation of wealthy to affirmatively assist less fortunate); *see also* BARBARA HERMAN, THE PRACTICE OF MORAL JUDGMENT (1993) (providing critical analysis of Kant's ethics); ONORA O'NEILL, CONSTRUCTIONS OF REASON: EXPLORATIONS OF KANT'S PRACTICAL PHILOSOPHY 138-40 (1989) (noting that without affirmative social support, humans may not be capable of dignity of rational agency).

156. George P. Fletcher, *Law and Morality: A Kantian Perspective*, 87 COLUM. L. REV. 533, 535 (1987).

157. JOHN RAWLS, A THEORY OF JUSTICE 141 (1971); *see also* MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE, 69 (1982) (discussing Rawls's approach in this respect).

158. *See, e.g.*, FLETCHER, *supra* note 130, at 19 ("It seems that Rawls simply assumes that national borders are 'given' at the outset of the discussion. He seems to be concerned about justice within particular societies, but this is obviously an arbitrary limitation on the analysis."); Singer & Singer, *supra* note 117, at 117 (describing Rawls as among those who "frame their discussion in terms of how members of a community should treat each other, and overlook the fact that the majority of our fellow human beings are not members of our community"); *cf.* ERIC RAKOWSKI, EQUAL JUSTICE 1-2, 5, 19-20 (1991) (articulating theory of general "equality of fortune" seeking to negate adverse effects of involuntarily incurred dimi-

Ultimately, Rawls's analysis must come to terms with the argument that if, for example, one's genetic limitations or inherited wealth are morally arbitrary, severe deprivations imposed solely on the basis of place of birth are equally arbitrary.[159] If the logic, as opposed to the letter, of Rawls's argument were to be extended internationally, freedom of movement not merely within but between nations might be considered among the Rawlsian basic liberties.[160]

Setting aside the problem of whether Rawls's deepest insights are compatible with sovereign nation-states, Rawls's own theory would thus seem to suggest that "[n]ationality is just one further deep contingency (like genetic endowment, race, gender, and social class)."[161] Whether Rawls's most basic assumptions really imply an open entry policy would then depend upon whether such a policy advances the basic interests of an assumed continuum of relatively disadvantaged persons and would not overtax our abilities to comply with such a policy choice.[162] Ultimately, the most basic Rawlsian principles might well suggest an open entry policy, if not more radical innovations.

Thus consistent forms of Kantianism, libertarianism, egalitarianism, certain natural rights or natural law theories, and even Rawlsianism may lead in the direction of open borders. Whether standard forms of utilitarianism tend in the same direction is unclear. The answer may depend most fundamentally upon whether we are to aim at maximizing the welfare of all persons everywhere affected by our border policy,[163] or only of all persons currently within the boundaries of our decision-making community.[164]

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nutions of resources or opportunities, subject to appropriate constraints, but not substantially applying these basic ideas in contexts of immigration or international movement).

159. *See, e.g.*, Whelan, *supra* note 64, at 10.

160. *See id.* at 7.

161. THOMAS W. POGGE, REALIZING RAWLS 247 (1989). For further discussion, see, for example, Pisarchik, *supra* note 18, at 727-31, 743-44 (arguing that Rawlsian subjects behind Rawls's "veil of ignorance" would commit themselves to open immigration policies); Paul J. Weithman, *Natural Law, Solidarity and International Justice*, *in* FREE MOVEMENT, *supra* note 10, at 181, 194-97 (discussing possible global or international application of Rawls's "difference principle"). Note that an open entry policy need not try to capture and redistribute all of the advantages of native United States citizenship to all those who would benefit thereby, or even to all would-be entrants into the United States.

162. *See* discussion *supra* part II.

163. *See* Singer & Singer, *supra* note 117, at 122 (citing Victorian utilitarian Henry Sidgwick).

164. *See* Jeremy Bentham, *Pannomial Fragments*, *in* A BENTHAM READER 243, 243 (Mary Peter Mack ed., 1969). Bentham may, however, in this context be taking the welfare of the community as sufficiently broad for his present purposes.

Of course, a utilitarian who proposes to ignore the welfare of foreigners in the utilitarian calculus must face a powerful objection of arbitrariness. To the extent that the utilitarian wishes to maximize, over any time frame, something like average or total utility, even discounting for uncertainties, it is difficult to say why a unit of local pain counts for more than a unit of foreign pain. An open entry policy, when suitably qualified as by our discussion above, seems fully compatible with otherwise viable and attractive forms of utilitarianism.[165]

IV. CONCLUSION

The basic lines of the argument for a radical revision of United States immigration law and policy seem clear, primarily because the reasoning supporting the current restrictive policies seems to have no historical or moral justification. An open entry policy may actually bring greater benefits to United States society as a whole, and any costs imposed on particular segments to society can certainly be addressed through legislative cost-shifting measures. It cannot be pretended, however, that no loose ends remain. Certainly, not all possible arguments against an open entry policy have been ventilated.[166] Nor have I sorted out all the differences between open entry policies and policies that moderately restrict entry while aiming at diversity among immigrants,[167] or the relationships between immigration policy and international wealth redistribution, foreign aid, or terms of trade.[168] Finally, I have not con-

165. *See* Beitz, *supra* note 126, at 594. Professor Beitz argues, contrary to Henry Sidgwick's ultimate conclusion, that utility is not clearly maximized by restricting entry for the purported sake of community cohesion, the development of culture, and political stability. Professor Beitz concludes that

> under contemporary conditions, it is most unlikely that the value derived by their citizens from the cohesion and order of relatively well-endowed societies is greater than the value that could be gained by others from the redistribution of labor (or wealth) that would be brought about by adherence to cosmopolitan policies.

Id.

166. For example, possible permanent or temporary negative and positive effects on developing countries of a further "brain drain" have not been confronted. This is mainly because such possible effects do not seem to loom large in any authentic public debate, but also because the evidence seems to suggest that the likely effects, particularly when U.S. earnings sent to the entrants' native countries are considered, seem manageable in practical and moral terms. *See, e.g.*, DOWTY, *supra* note 41, at 161 (stating that lesser developed countries suffer least from "brain drain"); Hudson, *supra* note 32, at 202. Again, it would seem that nations benefiting from a "brain drain" could at least partially compensate those developing nations adversely affected.

167. While various alternative schemes might seem to improve upon current immigration law and policy, any departure from open entry would seem to involve, prima facie, a restriction morally objectionable for reasons canvassed *supra* part III.

168. *But see* GALSTON, *supra* note 59, at 246; *supra* note 166.

sidered the extent to which the arguments raised above may or may not apply to other societies, such as Germany, Australia, Canada, or Japan.[169]

However, an open entry policy need not have the adverse effects many critics predict. Indeed, as shown above, legislative responses can ameliorate any disproportionate burdens on particular segments caused by such a policy. The current morally arbitrary restrictions on immigration are not a reasoned response to the immigration issue. An open entry policy strips away such arbitrariness and leads to deeper and more enlightened debate on immigration.

No doubt there is an important difference between appreciating the feasibility and moral logic of a legal rule of free entry, and being psychologically "ready" to collectively implement such a rule in practice.[170] In this area as in others, though, the defense of legal privilege may over time come to be recognized as ultimately unconvincing. At such a point, a law of immigration based upon a policy of open entry would be recognized as the embodiment of moral common sense.

169. *See* Carens, *supra* note 13; Joseph H. Carens, *Nationalism and the Exclusion of Immigrants: Lessons from Australian Immigration Policy*, *in* OPEN BORDERS? CLOSED SOCIETIES?, *supra* note 34, at 41; Whelan, *supra* note 63, at 462 (referring to United States's low population density and per capita wealth). It is far from obvious that the moral obligation the United States bears to open its borders would entirely evaporate even if no other country took in significant numbers of legal immigrants, or contributed financially to assist in immigration into the United States.

170. *See* Nett, *supra* note 13, at 222-24.